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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-58

DICK JONES, *et al.*,

Petitioners

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Dick Jones, Govan Sanders, and James Washington [1] respectfully pray that a Writ of Certiorari issue to review the Orders of the United States Court of Appeals for the District of Columbia Circuit refusing to review a decision of the District Court (Corcoran, J.) not to certify this case as a class action on the sole ground that the motion to certify was not timely filed.

OPINIONS BELOW

On February 12, 1975, the Court of Appeals for the District of Columbia Circuit issued an Order granting

[1] Williams H. Patterson, one of the plaintiffs below, died on September 20, 1974.

Respondents' Motion to Dismiss Appeal. By Order of April 11, 1975, the Court denied Petitioners' Suggestion for Rehearing *En Banc*. The Order of the District Court for the District of Columbia, from which the appeal was taken, was issued on August 22, 1974. All three Orders are reprinted in the Appendix.[2]

JURISDICTION

The Order of the United States Court of Appeals for the District of Columbia Circuit denying petitioners' timely Suggestion for Rehearing *En Banc* was entered on April 11, 1975. This Petition for Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether a district court order denying a motion to certify class filed under Rules 23(b)(2) and 23(c)(1) of the Federal Rules of Civil Procedure is appealable as of right to the court of appeals pursuant to 28 U.S.C. § 1292(a)(1) when that order has the effect of substantially limiting the relief available on the movant's complaint for injunctive relief.

STATUTORY PROVISIONS INVOLVED

1. *Rule 23(b)(2)*:

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * *

[2] None of the three Orders has been reported. The Order of February 12, 1975, appears at page 1a, the Order of April 11, 1975, appears at page 2a, and the Order of August 22, 1974, appears at pages 3a-4a of the appendix.

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

2. *Rule 23(c)(1)*:

"(c) Determination by Order Whether Class Action to be Maintained; Notice, Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

3. *28 U.S.C. § 1292(a)(1)*:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

A. Introduction

This Petition invites the Court to resolve a conflict among the circuits on an issue of compelling importance in the prosecution of class action lawsuits seeking injunctive relief. The issue is whether an appeal as of right may be taken from a district court order denying class action certification when the order has the effect of substantially narrowing the scope of preliminary injunctive relief available to petitioners.

B. Substantive Background

The plaintiffs allege injury and seek relief on account of the failure of respondent government agencies to perform their statutory duty to provide low- and moderate-income housing and adequate relocation assistance to persons with little or no income, including plaintiffs and their neighbors, displaced and threatened with displacement by demolition of their residences for urban renewal of the Fourteenth Street Urban Renewal Area in the District of Columbia ("Fourteenth Street Area"). In the wake of disturbances in the District of Columbia during April 1968, the President pledged to take immediate and comprehensive steps under existing Federal statutes to renovate the devastated areas of the city.[3] Over seven years have elapsed, but this Presidential pledge faithfully to execute these laws for the benefit of plaintiffs and others displaced or threatened with displacement by urban renewal has not been honored. Plaintiffs seek to invoke the power of the Federal courts to assure that the laws governing relocation of urban renewal victims, like the petitioners, are more faithfully executed.

C. Procedural Background

Petitioners' original Complaint in this case sought, *inter alia*, a preliminary and permanent injunction (1) to restrain respondents United States Department of Housing and Urban Development and District of Columbia Redevelopment Land Agency ("RLA") from displacing and threatening to displace residents of the Fourteenth Street Area without providing adequate relocation housing and other benefits to which they are entitled under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601

[3] *See* "District of Columbia," 5 Weekly Compilation of Presidential Documents at 197-198 (January 31, 1969). Selected excerpts from the President's statement are reprinted at pages 5a-9a of the appendix.

et seq., and (2) to require RLA to maintain apartment units owned by it in a decent, safe, and sanitary condition.[4]

On March 3 and March 30, 1973, the District Court denied petitioners' application for a preliminary injunction, and on April 10, 1973, petitioners appealed under 28 U.S.C. § 1292(a)(1), to the United States Court of Appeals for the District of Columbia Circuit. While the appeal was pending, the district court *en banc* adopted a local rule requiring motions for class certification to be filed within ninety days after the filing of the complaint.[5] On October 29, 1973, the District Court stayed all discovery in this action pending the interlocutory appeal.

On April 26, 1974, the Court of Appeals reversed, in part, and remanded the case to the District Court for a hearing on petitioners' application for preliminary injunction, including the issues of (1) whether RLA is providing or plans to provide petitioners and persons similarly situated with adequate relocation housing and other benefits and (2) whether RLA is maintaining and plans to maintain the housing it owns in the Fourteenth Street Area in a decent, safe, and sanitary condition. *Jones* v. *District of Columbia Redevelopment Land*

[4] Pursuant to a District Court order of June 26, 1975, the individual petitioners filed an Amended Complaint on July 7, 1975, alleging, *inter alia*, that defendants have failed to prepare and implement an adequate plan (1) for the relocation of persons displaced and threatened with displacement on account of urban renewal activities in the District of Columbia, and (2) for the provision of the statutorily-required minimum number of housing units for low- and moderate-income individuals and families in the District of Columbia.

[5] Local Rule 1-13(b) was adopted by the district court *en banc* on June 22, 1973, and became effective on August 1, 1973. *See* Foreword, Revised Rules of the United States District Court for the District of Columbia, Rules Service Company at DCDC-i (August 1, 1973).

Agency, 162 U.S. App. D.C. 366, 372-73, 449 F.2d 502, 508-09 (1974).

On remand, present counsel entered the case and, on May 13, 1974, moved to dissolve the stay of discovery.[6] On June 10, 1974, petitioners filed a Motion to Certify Class (reprinted in the appendix at page 10a) and a motion to postpone ruling on class certification pending completion of discovery. Although the class motions were filed less than 90 days after the case was remanded to the District Court and, for the first time subject, as a practical matter, to the new local rule, the District Court denied class certification on August 22, 1974, on the sole ground that the motion to certify was untimely filed.[7]

On October 21, 1974, petitioners appealed the denial of class action certification. On February 12, 1975, the Court of Appeals dismissed the appeal for want of jurisdiction, relying solely on an opinion it issued two days earlier in *Williams* v. *Mumford*, —— U.S. App. D.C. ——, 511 F.2d 363 (1975), holding that 28 U.S.C. § 1292 (a)(1) can never confer jurisdiction to hear an appeal from an interlocutory order denying class certification. Petitioners then filed a timely Suggestion for Rehearing *En Banc*, which was denied on April 11, 1975, with Chief Judge Bazelon and Circuit Judges Wright, Leventhal, and Robinson noting that they would have granted rehearing for the reasons set forth in Judge Robinson's statement of April 4, 1975, in *Williams* v. *Mumford*, —— U.S. App. D.C. at ——, 511 F.2d at 371. (Judge

[6] On June 11, 1974, the District Court partially dissolved its stay of discovery to permit each side to depose only two persons. In all other respects the stay continues in effect pending response by the parties to the District Court's order of June 26, 1975, directing plaintiffs to file an amended complaint on or before July 7, 1975, and directing the respondents to file a motion for summary judgment or a motion to dismiss within ten days thereafter.

[7] In so ruling, the District Court held the motion to postpone mooted.

Robinson's statement is reprinted in the appendix at pages 11a-12a.) This Petition for Writ of Certiorari follows. As the panel and the Court of Appeals *en banc* both relied on *Williams* v. *Mumford*, *petition for cert. filed* May 9, 1975 (No. 74-1411), we respectfully request that this Petition be considered in conjunction with that in *Williams*.

D. The District Court Order Denying Class Action Certification Substantially Narrowed the Injunctive Relief Available to Petitioners

The Order of the District Court denying class action certification in effect precludes petitioners from obtaining the broad injunctive relief prayed for in their Complaint. Although petitioners sought to enjoin respondents from displacing all members of the class without providing adequate relocation housing and other benefits, petitioners can now obtain such relief only as to themselves; although petitioners sought to require respondent RLA to maintain each housing unit it owns within the Fourteenth Street Area in a decent, safe, and sanitary condition, they can now obtain improved maintenance only of their individual apartments. Clearly, the denial of class action certification has the practical and necessary effect of drastically narrowing the scope of injunctive relief available to petitioners.

Denial of class certification might permit respondents to satisfy the needs of the individual petitioners at the expense of their neighbors and thereby avoid responsibility for the performance of respondents' statutory duty to the petitioners *and* their neighbors to adopt and implement a plan that correlates the needs of persons displaced by renewal demolition with an adequate number of adequate units for displacees during the urban renewal cycle.[8]

[8] The defendants could, for example, respond to petitioners' Complaint by temporarily relocating them in one of the limited number of available units, thereby avoiding the government's statutory duty to provide relocation housing for all families it displaces.

It is necessary to proceed by a class action, rather than by individual lawsuit, in order to compel the government respondents to perform their statutory duties and to vindicate and enforce the legal rights of petitioners and their class—notably that of access to relocation benefits and to the number of adequate temporary and permanent housing units required to satisfy the legal rights of that class.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE VIEW ADOPTED BY FOUR OTHER CIRCUITS.

The holding of the District of Columbia Circuit—that 28 U.S.C. § 1292(a)(1) does not confer jurisdiction, under any circumstances, to hear an appeal from an interlocutory order of a district court denying class action certification under Rule 23(b)(2) and (c)(1)—conflicts with the decisions of every other circuit that has considered this issue. Four circuits—the First, Third, Fourth, and Ninth—have held or otherwise recognized that section 1292(a)(1) permits an appeal as of right from orders denying class action certification when the orders would have the effect of narrowing the scope of available injunctive relief. *See Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972); *Brunson* v. *Board of Trustees*, 311 F.2d 107 (4th Cir.), *cert. denied*, 373 U.S. 933 (1963); *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974); and *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

In *Yaffe* v. *Powers*, the First Circuit squarely held that a district court order denying class certification in effect denied plaintiffs' request for an injunction that would have restrained local police from engaging in citizen surveillance unless necessary to apprehend individuals

accused of specific crimes. The court reasoned that without class certification, injunctive relief would be limited to prohibiting defendants from surveilling the named plaintiffs. The court held, therefore, that section 1292(a)(1) empowered it to hear plaintiffs' interlocutory appeal from the denial of class certification:

> "Although the district court did not specifically act with reference to the injunctive relief claimed in the complaint, the substantial effect of its order denying leave to proceed as a class is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits . . . . [*W*]*e hold the district court's order appealable* [under § 1292(a)(1)] *as a denial of the broad injunctive relief sought* . . . ." 454 F. 2d at 1364-65 (emphasis added).

In *Brunson* v. *Board of Trustees*, the Fourth Circuit entertained an interlocutory appeal by black school children and their parents from a district court order denying class certification in an action to obtain injunctive relief against racial segregation in the public schools. The court found that denial of class certification would bar the plaintiffs from obtaining a general reorganization of all the schools in their district (or, failing that, a plan to desegregate the schools). The court held, therefore, that

> "[t]he limitation of each plaintiff to an individual action on his own account and the removal of all allegations appropriate to a class action narrowed the scope of possible injunctive relief . . . . The order [denying class certification] was, therefore, an appealable one under § 1292, for it was a denial of the broad injunctive relief which the plaintiffs sought." 311 F.2d at 108.

Similarly, in *Price* v. *Lucky Stores, Inc.*, the Ninth Circuit held that a district court order preventing plaintiffs from maintaining a class action was appealable as

of right under section 1292(a)(1) because "its effect is a 'denial of the broad injunctive relief' [against allegedly racially discriminatory hiring practices] which the plaintiffs sought on behalf of the class." 501 F.2d at 1179.

Finally, in *Hackett* v. *General Host Corp.*, the Third Circuit stated, albeit by way of dictum,[9] that "in those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injunction broader than would be appropriate for individual relief," appellate jurisdiction to review the refusal will lie under section 1292(a)(1).[10] This view was reiterated in *Rodgers* v. *United States Steel Corp.*, —— F.2d ——, 19 Fed. Rules Serv. 2d 749, 757 (3d Cir. January 24, 1975) (holding that an interlocutory order merely *postponing* class action determination was not reviewable but "a refusal [to certify a class] might support appellate jurisdiction under § 1292(a)(1).")

Thus, prior to the decision of the District of Columbia Circuit in *Williams* v. *Mumford*, *supra*—and its subsequent decision in the instant case—the courts of appeals were unanimous in finding jurisdiction under section 1292(a)(1) to review orders denying class action certification that had the effect of narrowing the scope of requested injunctive relief. The refusal by the District of Columbia Circuit to accept the view adopted by four other circuits creates a need for a definitive ruling from

[9] The appellant in *Hackett* attempted to invoke the "death knell" theory, under which the denial of class certification has been regarded as a final order within the meaning of 28 U.S.C. § 1291. *See, e.g., Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The Third Circuit in *Hackett* expressed the view that the availability of review under section 1292(a)(1) made it unnecessary to expand the applicability of *Eisen*. 455 F.2d at 622.

[10] The Court asserted that such appeals would adequately "protect against most district court inhospitality to class action litigation involving civil rights, the elective franchise, protection of the environment and the like." 455 F.2d at 622.

this Court to resolve the conflict among the circuits that have considered the question and to provide guidance to those that have yet to consider the issue. In the absence of a definitive ruling from this Court, it is likely that Rule 23(b)(2), an important vehicle for plaintiffs seeking relief in civil rights litigation, will not be administered uniformly in the Federal district courts.

II. THE DECISION BELOW DEPARTS FROM PRINCIPLES ESTABLISHED BY THIS COURT.

This Court has not ruled on the precise issue raised in this Petition. The Court has held, however, that the appealability of an interlocutory order under the predecessor to section 1292(a)(1)[11] does not depend on the form of the order, or on the procedural posture in which it was issued, but on whether the effect of the order is to grant or deny injunctive relief. The Court's earlier ruling applies equally under the successor provision, section 1292(a)(1), and demonstrates the error of the rule adopted below by the Court of Appeals.

In *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932), the defendants counterclaimed for an injunction against alleged patent infringement by the plaintiffs. The district court granted plaintiffs' motion

[11] Judicial Code of 1911, ch. 231, § 129, 36 Stat. 1087, 1134, the predecessor to section 1292(a)(1), provided, in relevant part, as follows:

> "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction, or appointing a receiver, to the circuit court of appeals. . . ."

to dismiss the counterclaim and defendants appealed. This Court affirmed the decision of the court of appeals that the predecssor to section 1292(a)(1) authorized an interlocutory appeal.

The plaintiffs in *General Electric* argued that the order was not appealable since it merely dismissed the counterclaim and did not by its terms refuse an injunction. This Court held, however, that the order dismissing the counterclaim effectively denied injunctive relief, for

> "the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer. The ruling of the Circuit Court of Appeals that an injunction has been denied by an interlocutory order which is reviewable under [the predecessor to section 1292(a)(1)] is sustained by reason and supported by the weight of judicial opinion . . . . Plaintiffs' motion to dismiss the appeal was rightly denied." 287 U.S. at 433.[12]

The decision of the Court of Appeals below—that the denial of a motion to certify class is never appealable under section 1292(a)(1)—is inconsistent with this Court's approach in the *General Electric* case. That approach would require the Court of Appeals to assess the

[12] This Court applied the same principle in *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449 (1935), an action for breach of contract, in which the defendant moved to stay all proceedings pending the outcome of arbitration required by the terms of the contract. Considering the jurisdictional question, *sua sponte*, the Court held that the defendant's motion was effectively an application for an interlocutory injunction, based on the arbitration defense, and that the district court's denial was therefore appealable under the predecessor to section 1292(a)(1). *Id.* at 452. As in *General Electric*, the Court based its ruling not on the form of the motion that gave rise to the district court's order, but on the effect of the order, which was to deny the requested interlocutory injunctive relief.

effect of the denial in limiting the scope of injunctive relief sought in the complaint, rather than focusing merely on the denomination of the motion denied by the District Court. In light of *General Electric*, this Petition should be granted to review the failure of the Court of Appeals to apply principles adopted by this Court.

CONCLUSION

Resolution of the conflict among circuits and correction of the departure of the Court of Appeals below from the principles announced by this Court are important to assure reasonably uniform administration of Rule 23 in the district courts and to provide a judicial remedy for the unlawful government activity that is at issue in this case.

WHEREFORE, petitioners respectfully pray that this Petition be granted.

Respectfully submitted,

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